

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE STATIC RANDOM ACCESS MEMORY  
(SRAM) ANTITRUST LITIGATION

No. 07-md-01819 CW

ORDER DENYING  
MOTION FOR LEAVE  
TO INTERVENE AND  
TO MODIFY  
PROTECTIVE ORDER  
(Docket No. 1343)

Non-parties Bryar Law Corporation, David Bratton and Communications Méga-Sat Inc. (collectively, Movants or Canadian plaintiffs), the plaintiffs in three Canadian putative class actions, move to intervene in this action, under Federal Rule of Civil Procedure 24(b)(1)(B), for the limited purpose of accessing certain evidence. Docket No. 1343. In addition, the Canadian plaintiffs move to modify the protective order governing the sought-after evidence.

Defendants NEC Electronics America, Inc. (presently known as Renesas Electronics America, Inc.) and NEC Electronics Corporation (presently known as Renesas Electronic Corporation), on behalf of themselves and certain Defendants (collectively, Defendants),<sup>1</sup> oppose the motion. Third party witness Kyocera Communications

<sup>1</sup> The opposing parties are Defendants Samsung Electronics Co., Ltd. and Samsung Semiconductor, Inc., Hynix Semiconductor, Inc., Hynix Semiconductor America, Inc., Etron Technology, Inc., Etron Technology America, Inc., Toshiba Corporation, Toshiba America Electronic Components, Inc. and Cypress Semiconductor Corporation.

1 (formerly known as Kyocera Wireless Corporation) joined  
2 Defendants' opposition, while the Indirect Purchaser Plaintiffs  
3 submitted a statement of non-opposition to the motions. Having  
4 considered all of the parties' submissions, the Court DENIES the  
5 Canadian plaintiffs' motions.

#### 6 BACKGROUND

7  
8 The Canadian plaintiffs initiated their lawsuits in British  
9 Columbia, Ontario and Quebec in 2007, seeking damages from the  
10 manufacturers and producers of static random access memory (SRAM)  
11 for alleged anti-competitive conduct in violation of Canadian  
12 antitrust law. Declaration of Reidar Mogerman, Exhibits A, B & C.  
13 They assert the same anti-competitive conspiracy alleged in the  
14 present action before this Court, except that the Canadian  
15 plaintiffs allege economic harm resulting from purchases of price-  
16 fixed SRAM in Canada. Progress in the Canadian SRAM litigation  
17 was halted until January 2010, pursuant to several pending  
18 appeals, and as of the date this motion was filed the parties had  
19 not begun discovery in any of the three actions. Mogerman Decl.,  
20 ¶¶ 2, 5.

21  
22 Canadian plaintiff Bryar Law brought an application before  
23 the British Columbia Supreme Court on September 21, 2010, seeking  
24 the production of unredacted versions of all materials filed by  
25 any party in this action in relation to the motions to certify  
26 classes of direct and indirect purchasers, including unredacted  
27 expert reports. Mogerman Decl., Exh. E at 3-4. On November 25,  
28

1 2010, the court ruled that limited precertification discovery  
2 would be permitted, but the discovery request was overbroad. The  
3 court found that the narrower request for unredacted expert  
4 reports was within the scope of limited discovery. Nevertheless,  
5 the court denied the discovery request, holding instead that the  
6 request for disclosure should be brought in the court presiding  
7 over the United States SRAM proceedings. The court reasoned that  
8 the undersigned and the parties in the United States SRAM  
9 proceedings better understood the nature of the information  
10 sought, the provisions of the protective order, and the numerous  
11 third party interests implicated in the disclosures sought.  
12

13 On March 21, 2011, the Canadian plaintiffs filed the present  
14 motions for permissive intervention and to modify the Court's  
15 protective order so that they could access "unredacted versions of  
16 the specific expert reports that have been produced by the parties  
17 in this action in connection with the motions for class  
18 certification." Mot. to Intervene for Limited Purpose at 5. The  
19 Canadian plaintiffs do not seek to participate actively on the  
20 merits of the present litigation. The parties in both the direct  
21 purchaser and indirect purchaser actions here have reached  
22 settlements.  
23

24 Presently, the Court's protective order, to which the parties  
25 stipulated, prohibits disclosure of discovery materials designated  
26 as Confidential or Highly Confidential, except as permitted by the  
27 terms of the order. Docket No. 333. The protective order  
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1 requires a party receiving discovery to notify the party  
2 designating information "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL -  
3 ATTORNEYS' EYES ONLY" after receiving service of a subpoena or an  
4 order issued in other litigation that would compel disclosure of  
5 such information. Furthermore, a party may not file in the public  
6 record any protected material without written permission from the  
7 designating party, and the party must comply with Civil Local Rule  
8 79-5 in filing any protected material.  
9

10 The Canadian plaintiffs do not request public disclosure of  
11 the unredacted expert reports. Rather, they seek to access the  
12 materials subject to the terms of the governing protective order,  
13 with proposed modifications that would permit them to use the  
14 materials in their actions in Canada. Counsel for the Canadian  
15 plaintiffs has stated that he and his co-counsel "will seek entry  
16 of comparable protective orders by the Canadian courts" and  
17 suggest that the relief requested here be contingent on the entry  
18 of such orders. Mogerman Decl., ¶ 8. Given their proposed course  
19 of action, the Canadian plaintiffs assert that they do not  
20 challenge this Court's sealing orders pertaining to the requested  
21 materials.  
22

## 23 DISCUSSION

### 24 I. Motion to Intervene

#### 25 A. Legal Standard

26 A court may, in its discretion, permit intervention by anyone  
27 who "has a claim or defense that shares with the main action a  
28

1 common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). A  
2 motion for permissive intervention under Rule 24(b) is the proper  
3 method for seeking to modify a protective order, Beckman Indus.,  
4 Inc. v. International Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992),  
5 and such motions have been granted on behalf of collateral  
6 litigants involved in lawsuits pending in non-federal  
7 jurisdictions. See e.g. id. (state action); In re Linerboard  
8 Antitrust Litigation, 333 F. Supp. 2d 333, 339 (E.D. Pa. 2004)  
9 (Canadian litigation); In re Aftermarket Automotive Lighting  
10 Prods. Antitrust Litig., 09 MDL 2007 (C.D. Cal. 2010)  
11 (unpublished slip op.) (Canadian litigation).

12  
13 In exercising its discretion, a court should "consider  
14 whether the intervention will unduly delay or prejudice the  
15 adjudication of the original parties' rights." Fed. R. Civ. P.  
16 24(b)(3). The requirements for permissive intervention are  
17 (1) the applicant must show independent grounds of subject matter  
18 jurisdiction; (2) the motion must be timely; and (3) the  
19 applicant's claim or defense, and the main action, must have a  
20 question of law or a question of fact in common. San Jose Mercury  
21 News, Inc. v. United States Dist. Court-Northern Dist. of Cal.,  
22 187 F.3d 1096, 1100 (9th Cir. 1999) (citing predecessor provision,  
23 Federal Rule of Civil Procedure 24(b)(2)).<sup>2</sup>  
24  
25

26  
27 <sup>2</sup> In 2007 the language of Rule 24 was amended as part of  
28 general changes to make the Civil Rules more easily understood and  
to increase the consistency of terminology. The changes were  
intended to be stylistic only.

## 1 B. Analysis

2 The parties do not dispute that the Canadian plaintiffs have  
3 satisfied the first and third prongs of the test for a permissive  
4 intervention. Rather, their dispute centers on the timeliness of  
5 the motion.

6 The Ninth Circuit test for the timeliness of a motion to  
7 intervene considers "1) the stage of the proceedings at which an  
8 applicant seeks to intervene; 2) the prejudice to other parties;  
9 and 3) the reason for and length of any delay." Empire Blue Cross  
10 and Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d  
11 1217, 1219 (9th Cir. 1995).

12 First, Defendants contend that the Canadian plaintiffs'  
13 motion is untimely because this case has settled. However, the  
14 fact that this action is closed as a result of the parties'  
15 settlements is not necessarily dispositive. District courts have  
16 permitted intervention for the limited purpose of accessing  
17 discovery in cases which have already settled. In re Linerboard  
18 Antitrust Litigation, 333 F. Supp. at 339 (finding non-party's  
19 motion to intervene timely when it was filed less than six months  
20 after the settlement of the underlying action and the commencement  
21 of movant's collateral litigation in Canada); see e.g., Beckman  
22 Indus., 966 F.2d 470 (motion to intervene sought and granted two  
23 years after settlement, although the Ninth Circuit did not analyze  
24 the timeliness of the motion to intervene); Foltz v. State Farm  
25 Mutual Automobil Ins. Co., 331 F.3d 1122 (9th Cir. 2003) (district

1 court permitted third-parties to intervene after case settled,  
2 although the propriety of the order granting permissive  
3 intervention was not addressed on appeal), compare, In re Vitamins  
4 Antitrust Litigation, 2001 U.S. Dist. LEXIS 25068 (D.D.C.)  
5 (granting the Canadian plaintiffs' motion to intervene in ongoing  
6 antitrust litigation in the United States for the purpose of  
7 seeking a modification of the court's protective order).  
8

9       Nevertheless, these cases are not controlling. The Canadian  
10 plaintiffs have not pointed to any authority stating that a  
11 district court may not deny permissive intervention when it is  
12 filed at this late stage. This litigation began in 2007, and the  
13 first of the expert reports sought through this motion was filed  
14 in this action in May 2008, while the last expert report was filed  
15 in August 2009. Three years later the Canadian plaintiffs moved  
16 to intervene only after nearly all parties had reached  
17 settlements. Although the Canadian litigation is still in its  
18 early stages, the present multi-district litigation has ended.  
19

20       The timeliness of the present motion is determined based on  
21 the status of this action and whether allowing a non-party to  
22 intervene is prejudicial to the parties in this action. In re  
23 Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 255  
24 F.R.D. 308, 316 (D. Conn. 2009). The delay in the Canadian SRAM  
25 litigation bears little weight in justifying a delayed motion to  
26 intervene in this action. Intervention would burden the parties  
27 and non-parties in this action by requiring them to continue  
28

1 policing access to confidential information disclosed in the  
2 present case. See Empire Blue, 62 F.3d at 1220-21 (affirming  
3 denial of a third-party's motion to intervene for the limited  
4 purpose of accessing discovery when the moving party failed to  
5 provide a reason for delaying its motion to intervene for years,  
6 despite knowing of the existence of the litigation). Such a  
7 continuing obligation is contrary to the expectation of parties  
8 that have sought to end litigation by settling the claims. See  
9 id. (finding that third party intervention to access discovery  
10 threatened to undo a settlement agreement).

12 In sum, the Canadian plaintiffs' motion to intervene is  
13 denied for lack of timeliness.

#### 14 II. Motion to Modify protective orders

15 Even if the Court were to grant the present motion to  
16 intervene, the Court finds that a modification to the existing  
17 protective order is unwarranted.

##### 19 A. Legal Standard

20 "It is well established that the fruits of pre-trial  
21 discovery are, in the absence of a court order to the contrary,  
22 presumptively public." San Jose Mercury News, Inc. v. United  
23 States Dist. Ct., 187 F.3d 1096, 1103 (9th Cir. 1999). However,  
24 "Rule 26(c) authorizes a district court to override this  
25 presumption where 'good cause' is shown." Phillips ex rel.  
26 Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1213 (9th  
27 Cir. 2002). Under Federal Rule of Civil Procedure 26(c), a "court  
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1 may, for good cause, issue an order to protect a party or person  
2 from annoyance, embarrassment, oppression, or undue burden or  
3 expense, including . . . requiring that . . . confidential  
4 research, development, or commercial information not be revealed  
5 or revealed only in a specified way . . ." Fed. R. Civ. P.  
6 26(c)(1)(G). The Supreme Court has interpreted Federal Rule of  
7 Civil Procedure 26(c) as conferring "broad discretion on the trial  
8 court to decide when a protective order is appropriate and what  
9 degree of protection is required." Seattle Times Co. v.  
10 Rhinehart, 467 U.S. 20, 36 (1984) ("[t]he unique character of the  
11 discovery process requires that the trial court have substantial  
12 latitude to fashion protective orders.").

14 B. Analysis

15 At the outset, the Canadian plaintiffs and Defendants here  
16 dispute the standard applicable to the present motion. The  
17 Canadian plaintiffs argue that a good cause standard applies to  
18 determine whether to restrict their access to the requested  
19 materials. Defendants argue that compelling reasons must exist to  
20 allow access to the expert reports, which were subject to numerous  
21 sealing orders.

23 Phillips, a case upon which Defendants rely, stated that  
24 "when a party attaches a sealed discovery document to a  
25 nondispositive motion, the usual presumption of the public's right  
26 of access is rebutted, so that the party seeking disclosure must  
27 present sufficiently compelling reasons why the sealed discovery  
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1 document should be released." 307 F.3d at 1213. However,  
2 Phillips and Foltz, 331 F.3d at 1134-36, applied the compelling  
3 reasons standard where intervenors asserted a federal common law  
4 right of access to material filed with the courts. In Phillips  
5 the Los Angeles Times moved to intervene to gain access to sealed  
6 records, attached to a motion for sanctions arising from purported  
7 discovery abuse, for the purpose of releasing certain information  
8 to the general public. The Ninth Circuit, in considering the  
9 newspaper's contention, determined that the newspaper was required  
10 to provide a compelling justification for the public release of  
11 sealed discovery attached to a non-dispositive motion. Id. at  
12 1212-13. Similarly, in Foltz, the intervenors, who were private  
13 plaintiffs involved in collateral litigation, sought certain  
14 sealed documents filed in connection with motions for summary  
15 judgment and did not make any express commitment to withhold the  
16 information from the public. 331 F.3d at 1136. The court weighed  
17 whether the collateral litigants could access the documents  
18 consistent with the public's federal common law right to judicial  
19 records, and required the demonstration of compelling reasons to  
20 justify allowing disclosure. Id. at 1134-37.

23 Here, however, the Canadian plaintiffs do not seek to release  
24 the redacted information to the public. Instead they intend only  
25 to use the information for purposes of litigating their actions in  
26 Canada and have agreed that their access should be contingent on  
27 their securing comparable protective orders in the Canadian  
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1 courts. Thus, the "compelling need" standard associated with the  
2 federal common law right of access to judicial records does not  
3 apply. See Beckman, 966 F.2d at 475 (rejecting the requirement  
4 that the intervenor show "extraordinary circumstances" or a  
5 "compelling need" to secure modification of a protective order,  
6 reasoning that "Ninth Circuit precedent strongly favors disclosure  
7 to meet the needs of parties in pending litigation."). The  
8 modification of the Court's protective order requires only a  
9 demonstration of good cause.  
10

11 The expert reports and declarations the Canadian plaintiffs  
12 seek, filed in connection with the motions for class  
13 certification, were redacted pursuant to the Court's sealing  
14 orders, not on the basis of the blanket, stipulated protective  
15 order. In issuing its orders to seal, the Court made specific  
16 determinations that good cause existed to seal the information.  
17 See e.g., January 11, 2011 Order Granting Defendants'  
18 Administrative Motion to Seal Documents (finding that certain  
19 specified sections of Michelle Burtis' Sur-rebuttal Declaration  
20 and Exhibits contained Kyocera's confidential, proprietary, and  
21 competitively sensitive information and constituted "sealable"  
22 material). Therefore, the burden is on the Canadian plaintiffs to  
23 establish good cause to modify the protective orders to allow  
24 access to the unredacted reports for the purposes of Canadian  
25 actions. See Phillips, 307 F.3d at 1211 n.1 ("the burden of proof  
26 will remain with the party seeking protection when the protective  
27  
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1 order was a stipulated order and no party had made a 'good cause'  
2 showing").

3 Turning to the application of the good cause standard, as  
4 noted earlier, in the Ninth Circuit, disclosure to meet the needs  
5 of parties in pending litigation is strongly favored. Beckman  
6 Indus., 966 F.2d at 475) (citing Olympic Refining Company v.  
7 Carter, 332 F.2d 260, 264-65 (9th Cir. 1964); see also Foltz, 331  
8 F.3d at 1131 ("Allowing the fruits of one litigation to facilitate  
9 preparation in other cases advances the interest of judicial  
10 economy by avoiding the wasteful duplication of discovery.")).  
11 However, "a court should not grant a collateral litigant's request  
12 for such a modification automatically." Id. at 1132. To  
13 determine whether a modification of a protective order is  
14 warranted, courts consider "the relevance of the protected  
15 discovery to the collateral proceedings and its general  
16 discoverability therein." Id. at 1132. In addition, the court  
17 must "weigh the countervailing reliance interest of the party  
18 opposing modification against the policy of avoiding duplicative  
19 discovery." Id. at 1133.

22 Although the Canadian plaintiffs satisfy the low threshold  
23 for demonstrating that they seek relevant information, see Foltz,  
24 331 F.3d at 1133 (stating that a court considering a motion for  
25 modification of its order makes only a "rough estimate of  
26 relevance"), and their motion does not attempt to circumvent  
27 Canadian procedures and discovery limitations, the avoidance of  
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1 duplicative discovery does not outweigh the reliance interests of  
2 the parties opposing modification of the protective order. The  
3 amount of duplicative discovery avoided will not be substantial  
4 because the sought-after unredacted expert reports focus upon and  
5 limit analysis to the United States market for SRAM and the impact  
6 of the alleged conspiracy on American businesses and consumers.

7  
8 Furthermore, the reliance interests of Defendants and third-  
9 party witness Kyocera are significant. They relied upon the  
10 protective order in releasing sensitive, confidential information,  
11 and the order made clear that a party seeking to file certain  
12 confidential information with the Court would have to move for a  
13 sealing order. Defendants and Kyocera may not rely on the blanket  
14 protective order alone as a guarantee that discovery information  
15 they produced would remain confidential. See id.; Beckman, 966  
16 F.2d at 476. However, they reasonably expected that discovery  
17 information that the Court ultimately ordered filed under seal,  
18 such as the expert reports and declarations in this case, would be  
19 barred from public access and not subject to use in other  
20 litigation outside of the United States. The need to police  
21 dissemination of their confidential information in three different  
22 Canadian cases as well as in this Court would prejudice Defendants  
23 and third-parties. "Among the goals furthered by protective  
24 orders is reducing conflict over discovery and facilitating the  
25 flow of information through discovery. . . [C]hanging the ground  
26 rules later is to be avoided because protective orders that cannot  
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1 be relied upon will not foster cooperation through discovery."

2 Id. at 1137 (quoting Wright, Miller & Marcus, § 2044.1).

3 The Canadian plaintiffs have not established good cause to  
4 modify the protective order to grant them access to the unredacted  
5 expert reports and declarations.

6 CONCLUSION

7 The Canadian plaintiffs' motions to intervene and to modify  
8 the protective order are DENIED. Docket No. 1343.

9 IT IS SO ORDERED.

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12 Dated: 11/1/2011

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14 CLAUDIA WILKEN  
15 United States District Judge  
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